

**IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH**

C.P. (IB) No.77/BB/2019
U/s 9 of IBC, 2016
R/w Rule 6 of I&B (AAA) Rules, 2016

In the matter of:

M/s. Ponneri Steel Industries
GNT Road, Peravallur Village,
Chinampedu Post,
Thiruvallur District,
Ponneri – 601 206.

- Petitioner/Operational Creditor

Versus

M/s. Gulam Mustafa Enterprises
Private Limited
Regd. Off: No.06, G.M. Pearl
1st Stage, 1st Phase, BTM Layout,
Bangalore – 560 068.

- Respondent/Corporate Debtor

Date of Order: 26th July, 2019

Coram: 1. Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)
2. Hon'ble Dr. Ashok Kumar Mishra, Member (Technical)

Parties/Counsels Present:

For the Petitioner : Ms. Annapoorna.S
For the Respondent : Shri Bojanna K.J and
Shri Josita Juris

ORDER

Per: Rajeswara Rao Vittanala, Member (J)

1. C.P. (IB) No.77/BB/2019 is filed by M/s.Ponneri Steel Industries ('Petitioner/Operational Creditor') under Section 9 of the IBC, 2016 read with Rule 6 of the I&B (Application to



Adjudicating Authority) Rules, 2016, by inter alia seeking to initiate Corporate Insolvency Resolution Process (CIRP) in respect of M/s.Gulam Mustafa Enterprises Private Limited ('Respondent/Corporate Debtor') on the ground that the Corporate Debtor has committed default for a total outstanding amount of Rs.28,69,533/- (Rupees Twenty Eight Lakhs Sixty Nine Thousand Five Hundred and Thirty Three Only) plus 18% interest per annum as per P.O. No.GM/GTT/ELEGANCE/184/17-18 dated 17.01.2018.

2. Brief facts of the case, as mentioned in the Company Petition, are as follows:

- (1) M/s. Ponneri Steel Industries ('Petitioner/Operational Creditor') is engaged inter alia in the business of sale of TMT Bars and having its office at GNT Road, Peravallur Village, Chinampedu Post, Thiruvallur District, Ponneri-6012016 and also at No.5/11, Branson Garden Street Kellys, Kilpauk, Chennai-600010.
- (2) M/s. Gulam Mustafa Enterprises Private Limited ('Respondent/Corporate Debtor') is a Private Limited Company incorporated on 14.04.1982 under the provisions of Companies Act, 1956 with CIN: U70100KA1982PTC004720 and having its registered office at No.06, G.M. Pearl 1st Stage, 1st Phase, BTM Layout, and Bangalore - 560068. Its authorised is Rs.10,00,000/- (Rupees Ten Lakhs Only) and the Paid-up Share Capital is Rs.1,40,500/- (Rupees One Lakh Forty Thousand Five Hundred Only).
- (3) The Operational Creditor in engaged, inter alia in the business of sale TMT Bars and the Corporate Debtor requiring Elegance and GTT tower, has issued purchase

order bearing No.GM/GTT/ELEGANCE/184/17-18 dated 17.01.2018 with Operational Creditor subject to terms and conditions mentioned therein.

- (4) Accordingly, the Operational Creditor has supplied the same in accordance with the Purchase Order. Upon delivery of the products, invoices were raised totalling for sum of Rs.28,69,533/- which amount remains due to be paid. The debt amount arises from sale of TMT Bars made to the Corporate Debtor for the GTT and Elegance Tower Project on 22.01.2018 vide Invoices bearing Nos.1907, 1908 and 1909 dated 22.01.2018. It is stated that towards the above dues, a credit note No.39 dated 13.02.2018 for Rs.3,880/- (Rupees Three Thousand Eight Hundred and Eighty Only) and a carry forward credit balance has been adjusted. The principal amount outstanding after adjusting the above credit note and credit balance is Rs.28,69,533/-.The Corporate Debtor had communicated receipt of the materials as well and despite this, has failed to make payments. Several reminders have been sent by the Operational Creditor to the Corporate Debtor.
- (5) Pursuant to the above, the Operational Creditor issued a Demand Notice dated 29.09.2018 to the Corporate Debtor under the IBC, 2016 in Form-3 of I&B (Application to Adjudicating Authority) Rules, 2016 demanding payments due. The demand notice was received by the Corporate Debtor and till date, the Corporate Debtor has neither made any payment to the Operational Creditor nor has it replied to the demand notice.



3. The Company Petition is opposed by the Respondent by filing statement of objections dated 12.07.2019, by inter alia contending as follows:

(1) The Petition is not maintainable either in law or on the facts and the same is liable to be dismissed in limine. The Petitioner is guilty of suppressing the material facts and have not approached this Hon'ble Court with clean hands and as such astuteness in drafting and filing the Petition to mislead the Hon'ble Court with a motive to harass the Respondent. The Respondent denies all the contents, allegations etc., levelled by the Petitioner except those which are specifically admitted by the Respondent. The Petitioner is put to strict proof of the facts as alleged in the Petition.

(2) It is stated that the Respondent disputes the claim made under the provision of the Code. The amount Rs.28,69,533/- (Rupees Twenty Eight Lakhs Sixty Nine Thousand Five Hundred Thirty Three Only) claimed in the said demand notice as well as the Petition is not tenable so as to invoke the provision of the Code. The intention of the Code is not for the purpose of recovery of any debt. The issuance of demand notice and thereafter filing Petition before this Tribunal under the Code is against the intent of the Code. The main objective of the Code is to streamline the insolvency process but not debt recovery. The actions of the Petitioner are not in conformity with the objective or intention of the Code. The initiation of proceedings under the Code is not rational, keeping in view the interest of the Respondent. The Code should only be aimed at revival of insolvent/bankrupt Company but



not to use its provisions as a recovery mechanism. The Respondent reserves its right to proceed against the petitioner.

- (3) The Respondent stated that it is not an insolvent Company and thus invoking the provisions of the Code to initiate the CIRP shall adversely affect the interests of the Respondent who is not an insolvent entity in any manner whatsoever. The Respondent has many employees, shareholders, creditors, customers, business clients, and other stakeholders, whose interest would be at stake upon initiation of CIRP.
- (4) It is alleged that the Petitioner had supplied sub-standard construction materials and the Respondent had raised objections to the same. Since the Respondent is a reputed Builder in Bangalore City engaged in construction of quality residential and commercial complexes in Bangalore City and thus the Respondent did raise a dispute with the Petitioner on receipt of the demand notice and the Petitioner had assured that they would replace the material with good quality materials with immediate effect. However, to the shock and surprise of the Respondent, the Petitioner has preferred to move this Tribunal making illegal claims.
- (5) It is alleged that the instant petition is filed with an intention to harass and to damage the reputation of the Respondent to arm twist the Respondent to budge to the demands of the Petitioner to make payment of the demanded amount pertaining to the supply of the construction materials, which are of poor quality and sub-standard.



- (6) It is alleged that when supply of the poor quality construction materials supplied by petitioner was brought to its notice with a request to replace the same with good quality construction materials, then the Petitioner had promised and undertaken to replace them with good quality construction materials. However, the Petitioner miserably failed to replace the same as promised and because of the delay, the progress of the construction of the Respondent Company was hampered substantially and the Respondent was constrained to purchase good quality steel from other reputed suppliers with additional investment. The Respondent could not deliver possession to the customers within the stipulated time due to the supply of poor quality material and purchasing the same from other reputed suppliers. Therefore, reputation of the Respondent/Builder was damaged substantially at the customer's level as well as the Bankers side since the Respondent had availed project loans.
4. Heard Ms. Annapoorna.S, learned Counsel for the Petitioner and Shri Bojanna K.J along with Shri Josita Juris, learned Counsels for the Respondent. We have carefully perused the pleadings of both the parties and extant provisions of the Code and the law on the issue.
5. Ms. Annapoorna.S, learned Counsel for the Petitioner, while pointing out various averments made in the Company Petition, Synopsis, has further submitted that even though the claim arises in the year 2018, they are in continuous correspondence with the Respondent. However the Petitioner failed to take appropriate legal action and thus issued Demand notice dated



29.09.2018, in Form 3, under the Code by inter alia demanding to pay an outstanding amount of Rs.28,69,533/- as on 30.06.2018. Therefore the Application is filed in accordance with law and the debt and default is proved beyond doubt and there is no disputed raised by the Respondent and thus Petition is eligible to be admitted by initiating CIRP against the Corporate Debtor.

6. Shri Bojanna K.J, learned Counsel for the Respondent, on the other hand, while reiterating various averments made in the statement of objections, as briefly stated supra, has further submitted that in order to maintain good commercial relationship among business circle, has not claimed damages for inferior quality of material supplied by petitioner and thus requested to replace it. However, the for the reasons best known to the Petitioner, instead of maintaining good commercial relationships, as expected by the Respondent, has invoked the provisions of Code to harass and tannish its goodwill in the market. Since the Petitioner promised to replace defective material and by believing the promise, they have not replied for the Demand notice. And merely receipt of material at the site do not mean certification of material unless it is certified by site Engineer. Therefore, he urged the Tribunal to consider their grievance in the interest of justice and dismiss the Petition so as to permit the Respondent Company to carry out its normal functions and initiating CIRP against the Respondents would not serve any purpose and it is against the object of Code.



7. After conclusion of the arguments, a sworn notarised affidavit dated 24.07.2019, filed by Shri M J Stephen, Director of the M/s. Gulam Mustafa Enterprise Pvt. Ltd., (Respondent), by inter alia stating are as follows:

- (1) The Petitioner had supplied sub-standard construction materials as against the standard specified by the Respondent Company and the Respondent had raised objection to the same several times through their executives telephonically since the Respondent is a reputed Builder in Bangalore City engaged in construction of quality residential and commercial complexes in Bangalore City.
- (2) It is stated the field engineer of the Respondent did raise the issue of the quality of steel supplied by the Petitioner and the Respondent did raise the dispute with the Petitioner. However, the Petitioner got issued the Demand Notice with a malafide intention. The Respondent on receipt of the notice had discussed the issue with the agents of the Petitioner at the Petitioners office. Consequently, the Petitioner had telephonically assured that they would replace the material with good quality materials with immediate effect. However, to the shock and surprise the Petitioner has preferred to move this Tribunal making illegal claims.
- (3) Respondent Company as a reputed Company had very good relationship with the many suppliers and Vendors and maintained a smooth transaction record and in the instant case only because of the poor and sub standard steel supplied by the Petitioner was not accepted by the Respondent Company and since the Petitioner had



assured to replace them with good quality, the Respondent Company had stopped the payment demanded and the only the Petitioner is duty bound and liable to replace the materials and the Respondent is not liable in whatsoever manner.

- (4) The claim of the Petitioner is not for a legally enforceable one and hence the claim of the Petitioner is liable to be dismissed for the reasons as stated above.

8. The Purchase Order No.GM/GTT/ELEGANCE/184/17-18 dated 17.01.2018, issued by the Respondent, contains the following terms and conditions:-

- (1) *"Please mention our purchase Order No. on all delivery challan/Bills to ensure timely payment.*
- (2) *Payment is effective by 60 days PDC.*
- (3) *50% Advance Against the Invoice Dispatch made by the Invoice Value.*
- (4) *Interest at Rate 18% is payable beyond 70 days.*
- (5) *Without purchase order no material should be supplied at any site.*
- (6) *Delivery of material supplied should be strictly as per delivery schedule mentioned on Purchase Order.*
- (7) *Delivery at sites accepted between 9.30 am to 5.30 pm on all working days except Sundays.*
- (8) *Actual quantity received and accepted at site exclusive of breakage is taken into consideration.*
- (9) *On delivery Challan/Bill, Purchase Order No, Quantity, make, size and name should be mentioned.*
- (10) *When purchase Order is issued in set, delivery of material should be in full set only.*
- (11) *If material supplies is of inferior quality then site engineers/supervisor has got every right to reject the material.*
- (12) *Purchase Order is valid for 30 days only.*
- (13) *+/- 5kg Tollarance Applicable.*
- (14) *Subject to Bangalore jurisdiction only".*

As per the above terms and conditions', 50% of advance against the Invoice dispatch to be made by the Invoice Value; payment should be effective by 60 days PDC, actual quantity received and accepted at site exclusive of breakage is taken into consideration, if material supplied is of inferior quality then site engineers/supervisor has got every right to reject the material etc. Invoices No. 1907, 1908, 1909 dated 22.01.2018 are stated to have been delivered to the Respondent, however, the Petitioner has filed illegible invoices along with Company Petition at Annexure-B, Page No.28 to 30 and Annexure-D1, D2, D3, Page No.48 to 50. Even though the learned Counsel for the Petitioner is directed to produce original copies of above Annexures, the Petitioner has failed to submit the original copies within the time granted by the Tribunal. Thus, we are inclined to decide the matter based on the material available on record.

9. So far as the condition whether material supplied in question has inferior quality or not, the Petitioner failed to produce any proof to substantiate the material is not of inferior quality except producing uncorroborated their email communications to the Respondent, and one of the communication stated to have been sent by the Respondent is dated 06.02.2018, wherein it is mentioned that there is no shortage in the material supplied, however, it did not say anything about the quality of material supplied. Unless all the terms and conditions contained in the purchase order in question are duly complied with by the Petitioner, amount claimed under invoice in question cannot be legally claimed and debt cannot be deemed to be established. Therefore, the Petitioner has



failed to substantiate one of the conditions as per the purchase order as stated supra.

10. Moreover, when the payment is to be made 50% as in advance and remaining amount within 60 days, the Petitioner failed to take any appropriate legal actions except sending some un-corroborated email communications, producing their own records to claim the alleged outstanding amount. The cause of action admittedly arise on 22.01.2018 and the Petitioner has not filed any documents to show that cited Engineers of the Respondent has certified the material in question was of required standard. When the Respondent failed to pay the alleged outstanding claim, the Petitioner too failed to take any appropriate legal action within reasonable time. In the first instance, after supplying the material in question, the Petitioner should try to get the certification of the quality of material so as to make any claim. However, after issuing emails, the Respondent finally issued statutory demand notice under the Code, dated 29.09.2018 by demanding to pay outstanding amount within 10 days. The instant Company Petition is filed only on 18.12.2018 after lapse of more than 2 months. Therefore, the Petitioner has failed to initiate appropriate legal action to recover the alleged outstanding amount within a reasonable time from the date of supply of the material and also within the reasonable time from the issue of the said demand notice.
11. The instant Company Petition is filed to invoke provisions of the Code in a very casual manner against the Corporate Debtor. The instant Application/Petitioner is filed by the



Petitioner under Rule 6 of the I&B(AAA) Rules, 2016, and under part III of application, it is stated as under:

PART-III

PARTICULARS OF THE PROPOSED INTERIM RESOLUTION PROFESSIONAL (IF PROPOSED)	
1.	<p><i>NAME, ADDRESS, EMAIL ADDRESS AND THE REGISTRATION NUMBER OF THE PROPOSED INSOLVENCY PROFESSIONAL</i></p> <p><i>Not Applicable</i></p>

12. As per Section 9(3), of the Code, the Operational Creditor shall, along with the Application furnish, among other things the name of the proposed Insolvency Professional to act as Insolvency Resolution Professional on 9(4), which reads as under:

*“an operational creditor initiating a corporate insolvency resolution process under this section, **may propose** a resolution professional to act as an interim resolution professional”.*

13. The Petitioner neither suggested any IRP nor request the Adjudicating Authority to appoint any qualified R P. As per code, CIRP will be conducted by IRP/RP and without appointing IRP, it cannot be conducted. The Petitioner, except claiming the amount in question on un-corroborated evidence, the Petitioner failed to substantiate the fundamental question of insolvency in respect of the Corporate Debtor, as per Section 2 of the Code. On the other hand, the Respondent claimed that they are solvent and they have not paid alleged outstanding amount on the ground that the Petitioner failed to replace substandard material. Therefore, it is for the Petitioner to make claim, after replacing the defective material supplied

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and getting required certificate from the Engineers of Respondent. Therefore, the instant Petition is filed only to recover alleged outstanding amount without any material. And the Adjudicating Authority cannot go into roving enquiry with regard to quality of material supplied.

14. It is a settled position of law that the provisions of Code cannot be invoked for recovery of outstanding amount but it can be invoked to initiate CIRP for justified reasons as per the Code. So far as the dispute is concerned, the Hon'ble Supreme Court in *Transmission Corporation of A.P. Ltd. Vs. Equipment Conductors and Cables Ltd.*,¹ it is, inter alia, held that existence of undisputed debt is sine qua non of initiating CIRP. As per para 34 of judgement, it is stated that Adjudicating Authority, while examining an application filed under Section 9 of Code, will have to determine:

- i. Whether there is an 'operational debt' as defined exceeding Rs.1 Lakh?
- ii. Whether documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid?
- iii. Whether there is existence of dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before receipt of demand notice of the unpaid operational debt in relation to such dispute?

If any one of aforesaid conditions is lacking, the application would have to be rejected.

¹(CA No.9597 of 2018) dated 23rd October, 2018, (2018) 147 CLA 112 (SC)



The Hon'ble Supreme Court in the case of *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited*², has inter alia, held that IBC, 2016 is not intended to be substitute to a recovery forum.

15. In view of the above facts and circumstances of the case, the Petitioner failed to substantiate the alleged outstanding amount by producing relevant documents to prove that the materials in question were supplied in required standard. Therefore, we are of the considered opinion that the Petitioner failed to establish its claim with regard to Principal amount and interest as claimed in the Petition and it is filed only to recover the alleged outstanding amount. Therefore, it is not a fit case for admission and it liable to be dismissed. However, the Petitioner is at liberty to replace the defective material, as requested by the Respondent and thereafter, the Petitioner can make claim and the Respondent should consider the same.
16. Hence, C.P. (IB)No.77/BB/2019 is hereby dismissed. Therefore, this order will not preclude the Petitioner from replacing the defective material supply to the Respondent and thereafter to make its claim and the Respondent is liable to scrutinize the claim, if it finds that they are liable to pay the same. No order as to costs.


(ASHOK KUMAR MISHRA)
MEMBER, TECHNICAL


(RAJESWARA RAO VITTANALA)
MEMBER, JUDICIAL

Shruthi

²(2018) 1 SCC 353